

Handout for August 8, 2023 Board of Directors Meeting

Item 3.4: Fish and Aquatic Habitat Collaborative Effort (FAHCE) Project

Staff Responses to FAHCE Final EIR Comments

This handout presents general staff responses to FAHCE Final EIR comments received between August 2, 2023 and noon of August 7, 2023. If additional letters or comments are received after that, staff plans to present verbal responses during the August 8 Board meeting.

1. Letter from Brian Meux, National Marine Fisheries Service to John Bourgeois, dated August 2, 2023

Comment: This letter proposes a “hybrid” alternative incorporating components from both FAHCE (the EIR Proposed Project) and the FAHCE-plus Alternative. It suggests that a hybrid alternative would minimize additional analysis and delays to complete the CEQA process and recommends that the hybrid alternative be included in the FAHCE program and further developed with the FAHCE adaptive management team.

VW Response: Valley Water appreciates the contribution of NMFS, along with other members of the Initialing Parties, to the FAHCE program since 1997. As a part of the process, fisheries biologists, planners, modelers and engineers from NMFS collaborated with the original Technical Committee and were instrumental in formulating the Proposed Project as specified in the 2003 Settlement Agreement. The FAHCE Plus alternative was developed as a result 30 + meetings over a four-year period. During that time, NMFS team worked side by side collecting field data for model verification. We thank NMFS’ and other members of Initialing Parties’ commitment to the Adaptive Management Team (AMT) and the Adaptive Management Program (AMP).

Before the Final EIR was released, NMFS had presented the hybrid alternative to Valley Water and the Initializing Parties (IPs) at the February 1, 2023 IP meeting. Final EIR Master Response 7 (Section 6.2.7 of the Final EIR) specifically discusses the hybrid alternative. The Master Response states that the EIR was not required to consider the hybrid alternative because it was submitted more than one year after the close of the Draft EIR public comment period, and because it does not reduce any significant impacts of FAHCE or FAHCE-plus flow measures. Instead, it is being offered as a potential way to better achieve Settlement Agreement objectives. The master response explains that with AMT agreement, Valley Water has committed to considering and fully evaluating NMFS’s alternative as part of the AMP as a priority, if the AMT agrees.

The NMFS comment letter implies that the Valley Water could adopt the NMFS alternative with little additional CEQA review. Staff disagrees. Master Response 7 explains the hybrid alternative’s major differences from both FAHCE and FAHCE-Plus. Substantial new impact analysis for this alternative would be required, including additional water resources (WEAP) modeling, and additional technical impact analyses based on the results of the WEAP modeling, especially on water supply and fisheries.

Staff recommends that the Board adopt the FAHCE-plus Alternative at the August 8, 2023 meeting, and allow Valley Water and the AMT to further develop and evaluate the hybrid alternative in detail after project approval. If the result of this process is a recommendation to implement the hybrid alternative, additional CEQA compliance would be required prior to Board considering approval of the hybrid alternative. Similarly, if the AMT agrees to propose other changes or refinement of the program during future adaptive management, additional CEQA compliance may be required prior to approval and implementation of the changed program.

2. E-mail from Libby Lucas to Board of Directors, dated August 3, 2023

Many of the commenter's concerns were addressed in the Final EIR, in responses to comment letter 16. The comments focus on the ability of the Proposed Project to achieve Settlement Agreement management objectives.

Comment: Alamitos Creek is feasible habitat for neither steelhead or chinook and LC2: Restore Los Gatos Creek by reconstituting Camden percolation ponds offline

VW Response: Thank you for your letter. As Valley Water responded in Section 6.3.16 of the Final EIR, the fundamental purpose of the Project is to implement the FAHCE Settlement Agreement, which includes restoration measures to improve habitat conditions in Alamitos Creek as well as many other FAHCE streams. While we acknowledge there will be challenges, Valley Water is committed to the FAHCE AMP which includes collaboration with the regulatory agencies to achieve the overall program objectives as described in Appendix A of the EIR.

Comment: Recommend to obtain a scientific 2nd opinion on the viability of anadromous fishery recovery in the stream systems identified in this Program EIR

VW Response: As described in Section 1.2 and 1.6 of the Final EIR, Valley Water consistently worked collaboratively with regulatory staff, scientific and engineering experts including fisheries biologists, modelers, planners, hydrologists, engineers for development of this program. The work involved many rounds of refinements to the program and established a framework to adaptively manage the program working with the regulatory agencies responsible for anadromous fish recovery including California Department of Fish and Wildlife, the United States Fish and Wildlife Service and the National Marine Fisheries Service. Appendix A details information about our program which includes a robust fisheries monitoring program which has completed 5-years of monitoring to further inform the adaptive management of this program.

Comment: Present conditions removed pulse flows needed for an anadromous fishery

VW Response: Pulse flow releases targeted to benefit the various lifestages of the fisheries are an integral part of the flow measures described in Appendix A to improve habitat conditions for fish.

Comment: FAHCE EIR Project hasn't a chance of succeeding in locations proposed and it needs additional engineering remedies to remove obstructions still present in river system.

VW Response: The fundamental purpose of the Project is to implement the Settlement Agreement as further described in Appendix A, the Fish Habitat Restoration Plan. This Plan includes both flow and non-flow measures to enhance conditions for the fisheries. Specifically, eighteen fish barriers are named in the agreement as priority barriers for removal. Valley Water has remediated 12 of these barriers thus far. In addition, the AMP is tasked with evaluating and determining whether additional barriers impede the overall management objectives for each creek. If additional barriers are identified through this forum, the parties have agreed to work together to collaboratively address those obstructions.

3. Letter Signed by CalTrout, Fly Fishers International Northern California Council and Water Power Law Group, dated August 7, 2023

Comment: CalTrout and NCCFFI (hereinafter commenter) asserts that the analysis in the Final EIR does not show that Settlement Agreement objectives, to restore and maintain fish and wildlife and other beneficial uses in good condition, will be met. It asserts that the FHRP would be consistent with these objectives and comply with Fish and Game Code Section 5937 only by showing that fish will be maintained in good condition. The commenter asserts this issue will be key in the SWRCB's consideration of Valley Water's water rights petition, even if the EIR is legally insufficient under CEQA. The commenter's main recommendation is that the FHRP AMP be revised to include measurable objectives, developed on best available information, to show steelhead and chinook salmon will be restored and maintained in good condition. The commenter anticipates further discussions with Valley Water and the other Initialing Parties to further develop measurable objectives, and the comment letter attached specific proposed measurable objectives for consideration.

VW Response: Many of the commenter's concerns are addressed in the Final EIR, Master Response 4 (adaptive management program), Master Response 6 (fish in good condition), and individual response to comment 10 (Section 6.3.10). The Fish Habitat Restoration Plan provides an adaptive management program supported by a robust monitoring program. Since 2016, Valley Water collected flow, temperature and fisheries data. Since 2020, at the request of the IPs, Valley Water embarked a three-year FAHCE Plus Pilot Flow implementation in Guadalupe and Stevens Creek. The actively monitoring flow conditions in the creeks together with implementing flow measures will inform adaptive management program. Valley Water is committed to fish in good condition through habitat improvements informed by the comprehensive monitoring program as described in Chapter 6 of the FHRP.

Comment: Our main recommendation is that Valley Water revise the FHRP's Adaptive Management Program to include measurable objectives (MOs) that have been developed based on Board of Directors guidance on the use of best available information to achieve the FAHCE Agreement's goal of restoring and maintaining salmon and steelhead in good condition on the Three Creeks. In our DEIR comments we provided a local definition for salmon and steelhead populations in good condition. We have explained

that the purpose of defining fish in good condition on the Three Creeks is to set a clear goal consistent with statute that can be used to gauge the effectiveness of the FHRP measures and inform adaptive management decisions over time. The purpose is not to establish a compliance threshold that could trigger enforcement action.

VW Response:

Valley Water appreciates the contributions of California Trout, Inc. (CalTrout) and Northern California Council Fly Fishers International (NCCFFI) in the FAHCE process. The flow and non-flow measures in the FAHCE Settlement Agreement that were developed by the Initialing Parties (IPs) are designed to comply with all applicable laws, including the fish in good condition requirements of Fish and Game Code section 5937. As a part of the process, fisheries biologists, planners, modelers and engineers from the IPs collaborated as part of the Technical Committee and were instrumental in formulating the Proposed Project as specified in the 2003 Settlement Agreement. The FAHCE Plus alternative was developed as a result of 30 + meetings over a four-year period that included the IPs. Valley Water has developed measurable objectives (MOs) to be used by the adaptive management team in assessing whether there may be opportunities for improvements to FAHCE. The measurable objectives relate directly to those habitat qualities impacted by Valley Waters facilities and operations, given the Settlement Agreement recognition that Valley Water is not responsible for other environmental conditions outside the control of Valley Water that may limit the population or distribution of salmonids in the three watersheds. Valley Water believes the only way to truly understand the benefits of FAHCE is by its implementation, which requires CEQA review and water rights change petitions before the State Water Board. The FAHCE program, as outlined in commitments presented in the Final EIR by Valley Water, includes both a robust adaptive management element and field monitoring effort intended to assess the contribution of FAHCE to improvements steelhead and salmon population dynamics in the Three Creeks watersheds. In addition to the MOs, Valley Water has committed to long-term monitoring of trends in the abundance and condition of salmonids resulting from FAHCE implementation that will be reviewed annually or more often through the collaborative adaptive management process. Until the FAHCE program is implemented, and monitoring has occurred over a number of years, trends in population abundance will be assessed. Finally, as described in Master Response 6, CEQA does not require the EIR to include a fish in good condition analysis.

4. Letter from Keith H Lichten, Regional Water Quality Control Board, Region 2, August 7, 2023

Comment: The RWQCB comment expands on RWQCB comments submitted on the Final EIR. These previous comments and Valley Water responses are in Final EIR Section 3.1.5. The RWQCB questions the daily temperature significance threshold used in the EIR, and asserts that the EIR improperly applies the RWQCB maximum weekly average daily temperature (MWAT), and that the MWAT is not merely an “evaluation guideline” for Clean Water Act impaired waters Section 303(b) listing. The RWQCB does not, however, insist that the 17 degrees Celsius MWAT be used as a CEQA significance threshold. The comment also expresses support for the NMFS “hybrid” alternative.

The second main set of comments reasserts the RWQCB's argument that payment of VHP fees is not an acceptable method for mitigating wetlands impacts. The RWQCB notes that the VHP in lieu fee program is now available to mitigate wetlands impacts, but the number of credits to purchase is limited. It questions Valley Water's Final EIR responses to RWQCB DEIR comments on this issue, which explain why using VHP fees as mitigation is consistent with State Water Resources Control Board (SWRCB) policies on wetlands mitigation.

VW Response: Valley Water does not agree that an MWAT of 17 degrees Celsius must or should be used as a significance threshold for purposes of CEQA evaluation, or with other assertions in the RWQCB comments regarding the appropriate temperature threshold for CEQA and regulatory purposes of the MWAT. Valley Water finds the RWQCB's assertion confusing as it contradicts the express language of the Listing Policy Section 6.1.3., and the RWQCB's own Response to Comment 3.2 submitted by the Santa Clara Valley Urban Runoff Pollution Prevention Program (SCVURPP) dated March 6, 2019, issued as a part of the RWQCB's 2018 Proposed Revisions to the clean Water Act Section 303(d) List addressing temperature in Los Gatos Creek. In that response to comment, the RWQCB states, quoting from the SWRCB Listing Policy section 6.1.3:

"Narrative water quality objectives shall be evaluated using evaluation guidelines. When evaluating narrative water quality objectives or beneficial use protection, the Regional Water Boards and the State Water Board shall identify evaluation guidelines that represent standards attainment or beneficial use protection. *The guidelines are not water quality objectives and shall only be used for the purpose of developing the section 303(d) List.*" (Emphasis added.)

The limitation on the use of temperature evaluation guidelines makes sense given the myriad of Clean Water Act and Porter-Cologne Water Quality Act statutes, regulations and guidance that apply to setting numeric water quality objectives. The RWQCB's comment on the Final EIR now takes a position that is contrary to the RWQCB's prior response to comments and the Listing Policy. Therefore, as requested in the RWQCB comment letter, Valley Water staff looks forward to an opportunity to meet with RWQCB staff to discuss these technical issues in detail.

Valley Water appreciates that the RWQCB comment recognizes that Valley Water, as lead agency under CEQA, has discretion to establish the temperature significance threshold used for the EIR, and this threshold is supported by substantial evidence presented in the Final EIR, including the response to the RWQCB's EIR comments. In particular, see responses to comments O4-C015, O5-C017, and O5-C018. Valley Water appreciates that the RWQCB is not requesting that the 17 degrees Celsius threshold be used as a threshold of significance for the FAHCE EIR, and we look forward to further dialogue with them on this issue. As to the RWQCB suggestion for Valley Water to approve the hybrid alternative as the FAHCE project, please see our response to the NMFS comment letter above.

Valley Water agrees the in-lieu fee (ILF) program establishment is a good milestone and thanks the RWQCB for its commitment to support streamline permitting by signing on the ILF enabling document. Thank you also for reminding us of the RWQCB's view of the limits of the ILF program.

The fact that the VHP was developed and approved as a Habitat Conservation Plan (HCP) and a Natural Community Conservation Plan (NCCP) to provide take authorizations for federally or state protected species (covered species) does not prevent Valley Water from relying on the plan to mitigate for impacts on waters of the state including wetlands. The State Board's dredge and fill procedures encourage a permit applicant to propose compensatory mitigation using a watershed approach based on a watershed profile developed from a watershed plan. "Watershed plan" is defined to include approved HCPs and NCCPs, and more specifically, the definition states that "[a]ny NCCP approved by the California Department of Fish and Wildlife before December 31, 2020, and any regional HCP approved by the United States Fish and Wildlife Service before December 31, 2020, which includes biological goals for aquatic resources, shall be used by the permitting authority as a watershed plan for such aquatic resources, unless the permitting authority determines in writing that the HCP or NCCP does not substantially meet the definition of a watershed plan for such aquatic resource." The RWQCB's assertions regarding the inadequacy of the ILF and underlying VHP as a "Watershed Plan" are even more confusing in light of the federal Clean Water Act compensatory mitigation rule (33 CFR Parts 325 and 332; 40 CFR Part 230), which was incorporated into Appendix A of the State Water Resources Control Board *Procedures for Discharges of Dredged or Fill Material to Water of the State* (April 2, 2019). Under the compensatory mitigation regulations, mitigation in accordance with the ILF once adopted and approved by the water board constitutes the highest priority for mitigation, and "watershed plans" are only needed in the absence of an approved ILF and its underlying plan; a "Watershed Plan" is only needed in the absence of an approved ILF or approved mitigation banks. Valley Water does understand that the availability of the ILF for purposes of mitigating particular project impacts to wetlands and non-wetland waters of the state is conditioned upon ILF program compliance, including all "stay-ahead" provisions of any ILF.

As to the notion that the Corps only accepts the Habitat Agency fees as minimization, but not as compensatory mitigation, the ILF Program enabling instrument, to which the Corps is a party, states that the "ILF Program will be used to compensate for unavoidable Impacts on, and for conservation and protection of, Waters of the U.S., FESA-listed anadromous fish under the jurisdiction of NMFS, and Waters of the State." The intent of the Valley Habitat Agency in establishing the ILF Program is "to provide streamlined mitigation for Habitat Plan covered activities that affect Aquatic Resources."

Valley Water acknowledges that the FAHCE Program was designed to protect steelhead and Chinook salmon as appropriate to each of the three creeks, and steelhead is not one of the species protected by the VHP. Valley Water is not proposing to pay VHP fees as mitigation for FAHCE impacts on steelhead. As our EIR demonstrates, the proposed project FAHCE and the FAHCE plus alternative would benefit and improve the habitat for fisheries including steelhead, and because the project would not result in adverse impacts on fisheries, no mitigation for fisheries impacts would be required.

Valley Water looks forward to working with RWQCB to identify all possible ways by which Valley Water may rely on payment of VHP fees to mitigate for impacts to waters of the state and aquatic resources that are or could be addressed in the VHP.